Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
2010 Quadrennial Regulatory Review –	)	MB Docket No. 09-182
Review of the Commission's Broadcast	)	
Ownership Rules and Other Rules	)	
Adopted Pursuant to Section 202 of	)	
the Telecommunications Act of 1996	)	
	)	
Promoting Diversification of	)	MB Docket 07-294
Ownership in the Broadcast Services		

COMMENTS OF
ARSO RADIO CORPORATION

Arso Radio Corporation ("ARSO")[1] submits these comments in response to the Commission's *Notice of Proposed Rulemaking*[2] ("*NPRM*") as a party that has been awaiting Commission action on a vital multiple ownership issue for **nearly ten (10) years** and as one of the Petitioners that filed Petitions for Reconsideration of the Commission's *2002 Biennial Review Order* [3] to request the Commission finally act upon the long-standing Petition for Reconsideration regarding the definition of "market" as it relates to the island of Puerto Rico.

The *NPRM* invites comments, in paragraph 71, with respect to the calculation of market size based on the number of commercial and noncommercial stations in the "relevant local market". As detailed below, ARSO believes the Commission should act to clarify the definition of "local market" as it relates to Puerto Rico and more accurately reflect the physical and economic realities rather than Arbitron's arbitrary definition. As such, ARSO believes that action on the long-standing Petition for Reconsideration referenced above to clarify the issue of "relevant local market" as it relates to Puerto Rico first needs to be addressed.

For purposes of these comments, ARSO by necessity incorporates its previously filed Petition for Reconsideration of the *2002 Biennial Review Order*. As noted in footnote 47 of the NOI, the *Prometheus* decision did confirm that the Commission acted

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[1] Arso is an FCC licensee of broadcasting facilities located in Puerto Rico.

[2] *Notice of Proposed Rulemaking* in MB Docket Nos. 09-182 and 07-294 (rel. December 22, 2011)("*Notice*")

[3] *See 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13711-47 (2003) ("*2002 Biennial Review Order*"), *aff'd in part and remanded in part, Prometheus Radio Project, et al. v. F.C.C.*, 373 F.3d 372 (3d Cir. 2004) ("*Prometheus*"), *stay modified on rehearing*, No. 03-3388 (3d Cir. Sept. 3, 2004) ("*Prometheus Rehearing Order*"), *cert. denied,* 73 U.S.L.W. 3466 (U.S. June 13, 2005) (Nos. 04-1020, 04-1033, 04-1036, 04-1045, 04-1168, and 04-1177).

within the scope of its authority in redefining "markets" for purposes of multiple ownership from a contour overlap methodology to using Arbitron radio "Metro" markets, finding that such a decision was a "rational exercise of rulemaking authority"[4]. However, neither the *Prometheus* court nor the Commission has **EVER** addressed the crux of ARSO's argument relating to the decision to adopt the Arbitron "Metro" definition in Puerto Rico as the appropriate definition of a radio market for purposes of calculating permissible local ownership limitations. ARSO requested, in its Petition for Reconsideration filed in ***September 2003***, and reiterates such request via these comments, that (i) the definition of the Puerto Rico Radio Market be modified to reflect the geographic and social realities of the island in accordance with the definitions propounded by the Office of Management and Budget, or (ii) an exception be created for the definition of Radio Market for Puerto Rico in accordance with past Commission precedent or (iii) the Puerto Rico radio market be defined using the previously employed contour-overlap methodology as contemplated for markets not in an Arbitron Survey Area.

Background

In the *2002 Biennial Review Order*, the FCC adopted the Arbitron Metro Survey Area ("Arbitron Metro") as the definition of radio market for the purpose of determining compliance with the local radio ownership rule.[5] In adopting the Arbitron Metro, the *2002 Biennial Review Order* reasoned that *"Where a commercially accepted and recognized definition of a radio market exists, it seems sensible to us to rely on that market definition for purposes of applying the local radio ownership rule. Arbitron, as the principal radio ratings service in the country, has defined radio markets for most of the more populated urban areas of the country. These radio markets – Arbitron Metros – are Arbitron's primary survey area,* ***which in turn are based on Metropolitan Areas (MAs) established by the Office of Management and Budget (OMB) (emphasis added)****"*[6] The *2002 Biennial Review Order,* in footnote 573, provided a further explanation of MAs and provided reference material concerning the methodology the OMB used in defining MAs and a link to information about the most recent MA listing, incorporating data from the 2000 census. The *2002 Biennial Review Order*, in reaching its conclusion to use the Arbitron Metro, argued that "people in the United States tend to be clustered around specific population centers"[7] and adopted one commenter's position that "Radio stations compete in Arbitron markets"[8]. As a result, the *2002 Biennial Review Order* concluded that the Arbitron Metro was the appropriate standard for the purpose of calculating compliance with the local ownership rule. ARSO filed its Petition for Reconsideration in ***September 2003***, and despite a passing reference in prior Commission order that the issue of Puerto Rico market definition would be addressed "in

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[4] *Prometheus,* 373 F.3d at 425.
[5] *2002 Biennial Review Order* paragraph 273
[6] *2002 Biennial Review Order* at 275
[7] *2002 Biennial Review Order* at 273
[8] *2002 Biennial Review Order* at 276

a separate proceeding"[9], to this date ***no*** action has ever been taken regarding the issue discussed herein, which in turn has adversely affected broadcasters in Puerto Rico who, in the face of serious economic adversity, are subject to disparate interpretations of Commission rules than radio stations on the US mainland regarding their ability to own and acquire radio stations. The *NPRM* also fails to address this issue, despite previous assurance from the Commission that the issue would be addressed.[10]

Comments

The Commission's adoption of and reliance upon Arbitron's Metro definition was predicated on the assumption (as noted above) that the Arbitron Metro was, in turn, based on the OMB's Metropolitan Areas (MAs). Indeed, the *2002 Biennial Review Order* extensively footnoted (in footnote 573) how the OMB defined Metropolitan Areas and where to find the most updated information concerning the MAs. This assumption is likely correct in most of the United States but it is completely erroneous when applied to Puerto Rico. Arbitron's Metro definition for Puerto Rico is the ***ENTIRE*** island of Puerto Rico.[11] However, the OMB does ***NOT*** define the entire island of Puerto Rico as a Metropolitan Area. Indeed, according to the most recent OMB MA list, which incorporates information from the 2000 census, Puerto Rico has ***EIGHT*** (8) Metropolitan Statistical Areas and ***THREE*** (3) Combined Statistical Areas (which are larger population areas consisting of combinations of Metropolitan Statistical Areas and/or Micropolitan Statistical Areas).[12] According to the OMB's Bulletin, Metropolitan Statistical Areas have "at least one urbanized area of 50,000 or more population, plus adjacent territory that has a high degree of social and economic integration with the core as measured by commuting ties"[13]. Arbitron, presumably because of the geographic isolation of Puerto Rico from the United States and as a matter of convenience, simply defined the entire island as one market. However, the assumptions made in the *2002 Biennial Review Order* (i.e. "Radio stations compete in Arbitron markets") do not hold true in Puerto Rico because of geography. For example, it is impossible for a station in Mayagüez to compete with a station in San Juan because intervening terrain and geography (including Mt. Cerro de Punta, at 4,390 feet), precludes each station's signals from being heard in the other's community. Yet, because of the Arbitron Metro definition encompassing the entire island, a Mayagüez station and a San Juan station are

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[9] *Report and Order and Order on Reconsideration Notice of Proposed Rulemaking* in MB Dockets No. 06-121, 02-277, 01-235, 01-317, 00-244, 04-228 and 99-360, FCC 07-216 (rel. February 4th, 2008) in which the Commission stated in footnote 427 that:
"We note that a number of parties challenged the Commission's decision in the *2002 Biennial Review Order* to define local radio markets using Arbitron Metro markets instead of a contour overlap methodology. Some sought Commission reconsideration…. ARSO asks the Commission to use a different radio market definition than the Arbitron Metro definition for the island of Puerto Rico. ARSO Petition at 1-7. We have granted ARSO's waiver request to use the interim contour-overlap methodology pending the outcome of its Petition, ***which will be resolved in a separate proceeding.***" (emphasis added). ARSO still awaits that separate proceeding.

[10] See footnote 9 above.
[11] See Arbitron Metro Map: (http://www.arbitron.com/downloads/Arb_US_Metro_Map_10.pdf)
[12] See List 5, Attachments to OMB Bulletin 03-04 (http://www.whitehouse.gov/omb/bulletins/b03-04_attach.pdf
[13] *Id.*

now presumed to be in the same radio market. The conclusion that stations in these cities would compete with each other for the same population ("*radio stations serve people, not land*"[14]) is entirely misplaced. The size (three times that of Rhode Island) and topography of the island makes such a conclusion a physical impossibility. It is precisely because of the unique character and topography of Puerto Rico that the Commission has long-established precedent in treating radio stations in Puerto Rico differently than those on the mainland United States. For example, the Commission recognized in *St. Croix Wireless Co., Inc.*, 8 FCC Rcd 7329, 74 Rad. Reg.2d (Pike & Fisher) 202 (1993) that adoption of alternative standards for purposes of determining protected and interfering contours was prudent and necessary to accommodate the greater permissible HAAT that Puerto Rico and Virgin Island stations antennas are allowed (to overcome geographic obstacles). This was later adopted as rule revision in the Commission's Second Report and Order in MM Docket 98-93 (*In the Matter of 1998 Biennial Regulatory Review - Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules – FCC 00-368)*, 15 FCC Rcd 2149 (2000), all as a result of the "unique topography" of the island (see Short-spaced FM Station Assignments by using Directional Antennas, *MM Docket 87-121, FCC 91-273, 6 FCC Rcd 5356* at 51); see also 47 C.F.R. §73.211(b)(3). Other examples include 47 C.F.R. §73.1210 (TV/FM Dual Language broadcasting in Puerto Rico) and 47 C.F.R. §73.807 (Minimum distance separation between LPFM stations). The geographic obstacles are further evident by the fact that there are a greater number of AM and FM stations licensed to the island of Puerto Rico than to a comparable geographic sized area in the mainland United States.[15]

ARSO suggests, in light of the foregoing evidence that the Arbitron "Metro" definition for Puerto Rico is ***not*** based on the OMB's Metropolitan Areas, that the Commission, as part of this *NOI* proceeding, **FINALLY** reconsider its decision in the *2002 Biennial Review Order* as it relates to Puerto Rico and that it;

(1) define the local radio markets in Puerto Rico in accordance with the OMB's eight (8) Metropolitan Statistical Areas on the island; or

(2) create an exception for stations in Puerto Rico, as established by existing Commission precedent, and define the relevant local radio markets as the three (3) Combined Statistical Areas as defined by the OMB; or

(3) remove Puerto Rico from the Arbitron Metro definition and instead use the previously utilized contour-overlap methodology for calculating permissible ownership limits for the island of Puerto Rico.

As aptly noted by the Commission in the *2002 Biennial Review Order*, "people in the United States tend to be clustered around specific population centers"[16]. The same conclusion holds true for Puerto Rico, and thus it would be entirely appropriate to employ the first suggestion and define the relevant market as each of the eight (8) Metropolitan

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[14] *2002 Biennial Review Order* at 273

[15] BIA's FCC Geographic Market List shows there are 127 "Full Power" radio stations licensed to Puerto Rico. The island is a rectangular shape of land approximately 35 miles north to south and 100 miles east to west.

[16] *2002 Biennial Review Order* at 273.

Statistical Areas as established and defined by the OMB. However, should the Commission believe this definition to be too narrow and not appropriate in light of its reasoning in the *2002 Biennial Review Order* as well as the directives of the 3rd Circuit in the *Prometheus* ruling, then ARSO suggests that the OMB's Combined Statistical Areas (CSAs) for Puerto Rico, which divide the island into three (3) population areas, would be an appropriate definition. As a final alternative, Petitioner would suggest removing Puerto Rico from the Arbitron Metro definition (as has been demonstrated is wholly inappropriate as Arbitron's definition is **NOT** the same as the OMB's) and utilize the contour-overlap methodology which had previously served as the mechanism for calculating local ownership limits and which is one of the suggested methods for markets which are not defined by Arbitron in the pending proceeding (MM Docket 03-130) as noted in the *2002 Biennial Review Order*[17]. Parenthetically, Petitioner would note that among the proposals in Docket 03-130 for defining the relevant market in non-Arbitron surveyed areas is to use the OMB's Metropolitan Area (MA) definitions, (updated from the 2000 Census), which is also one of the Petitioner's suggestions herein. Indeed, the Commission has, in similar contexts, used the OMB's MA definitions for its purposes, such as defining "smaller markets" in the context of the new EEO rules.[18]

ARSO also comments on the issues raised in the *NPRM* by suggesting that the current local radio ownership rule, as a whole, is not conducive to the public interest given the plethora of additional programming and information sources available to the consumer. In an era where, for example, programming is available on ipod devices, on your wireless telephone, on your wifi-enabled phone/PDA or laptop, and via internet and satellite radio, those competitive sources of information and programming have significantly diminished the audience universe for terrestrial radio and have brought additional competitive pressures to local radio.

In order to compete against these new programming delivery systems, local radio needs regulatory flexibility and the ability to achieve efficiencies of scale in its operations to continue to be a vibrant and vital link to the public. Continuance of the local radio ownership rule in its current form runs counter to this new dynamic and hampers local radio owners' ability to compete with these new technologies that are not burdened with such regulations. In particular, the elimination of sub-caps between AM and FM stations would seem to be appropriate at this juncture as technical advances such as HD Radio and alternative program distribution (stations in both services use non-broadcast pathways such as "podcasts" to distribute their programming in addition to traditional broadcasts) have made the sub-cap limitations an unnecessary restriction. Market consolidation should not be a factor in redefining the rule, because in difficult economic times, consolidation enables continuation of multiple programming alternatives (an economic corollary to Darwin's "survival of the fittest" axiom).

Finally, ARSO further comments on the issue of local news service ("LNS") and shared services ("SSA") agreements, as sought in Paragraph 195 of the *NPRM* and

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[17] *2002 Biennial Review Order*, 657-670.

[18] See 47 C.F.R. 73.2080(e) which uses OMB definitions and standards for defining "smaller market" for the purposes of determining the number of EEO initiatives a station must undertake during a license term.

whether same should be considered attributable under the Commission's rules. ARSO contends that these agreements facilitate the continued provision of broadcast services by enabling stations which otherwise would not have the financial ability to provide vital information and programming to their communities to be able to furnish their communities with such information and programming. When appropriately drafted and complete with the requisite safeguards to ensure that the licensee has not abandoned control of its license to the provisioning party, both LNS and SSA agreements are invaluable in aiding a broadcaster without sufficient financial resources (particularly in this challenging economy) to bring relevant programming and information to its community and (in the case of SSAs) allow the provision of "back-office" administrative operations by experienced personnel. Indeed, in the case of SSA agreements for matters such as billing, traffic, payroll and other administrative matters, those types of services are readily delegable to third parties (i.e. payroll services) currently and would, if deemed attributable, could have the unintended effect of creating attributable interests in broadcast licenses for national companies like ADP and Paychex.

In the event the Commission elects to consider LNS and SSA agreements to be "attributable", ARSO would suggest that existing agreements of this nature be grandfathered until such time as there is an assignment of the license that is subject to such agreements, much in the same manner as licensees are currently grandfathered pursuant to Note 4 in 47 CFR §73.3555 for ownership holdings that predate July 2nd, 2003 (the date of the *2002 Biennial Review Order*). Parties whom entered into agreements that were previously compliant with existing FCC Rules should not be required to modify or terminate such contractual agreements solely because of a change in Commission policy that re-characterizes such agreements.

Conclusion

For the foregoing reasons, ARSO favors revision of the local radio ownership rule, but even in the event it is retained in its current form, ARSO requests the relief requested in its previously filed Petition for Reconsideration, specifically that the Commission either (1) define the local radio markets in Puerto Rico as the OMB's eight (8) Metropolitan Statistical Areas; (2) define the local radio markets in Puerto Rico as the OMB's three (3) Combined Statistical Areas; or (3) remove Puerto Rico from the Arbitron "Market" definition of local radio market since it does not track the OMB definition in Puerto Rico and utilize the previous "contour-overlap" methodology for determining applicable limitations on ownership. ARSO also favors the non-inclusion of LNS and SSA agreements as "attributable" interests, but in the event these type of agreements are to be considered "attributable", it should only be applied prospectively

and existing agreements should be grandfathered until there is a change in the licensee that is the subject of such agreements.

Respectfully Submitted

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